No. 212

IN THE

SUPREME COURT OF THE UNITED STATES

(OCTOBER TERM, 1945)

P. G. LAKE, INC.,

PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

W. A. SUTHERLAND
Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The undersigned respectfully moves this Honorable Court for leave to file the annexed brief as amicus curiae in the above entitled cause.

Respectfully submitted,

W. A. SUTHERLAND,

Amicus Curiae.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING.

W. A. Sutherland of Atlanta, Georgia, pursuant to leave of Court, files this brief as amicus curiae in support of the petition for rehearing filed in the above entitled cause. It is respectfully submitted that the petition for rehearing should be granted for the reasons hereinafter set out in this brief.

This brief is filed primarily because of counsel's interest in what seems to him to be a breakdown of the administrative process which is so clearly illustrated by the Commissioner's position in the present case.

This Court has been much disturbed by the number of tax cases which it has been called upon to consider in recent years. The voluminous amount of such litigation in this Court is symptomatic of the large volume of tax controversy—much of it avoidable—which now burdens the courts, the treasury and the taxpayer. The present case affords an opportunity for this Court to see clearly into one of the chief causes of the difficulty, and to do much to alleviate the situation by an emphatic statement definitely and openly placing a large part of the blame where it belongs.

The willingness of the Commissioner of Internal Revenue to make such an unfair, extreme and unfounded contention as underlies the present controversy illustrates, with a clarity and simplicity unusual in the tax field, one of the primary causes of the increasing volume of tax litigation. That is the apparent unwillingness of the persons charged with the administration of the tax laws fairly to decide the questions constantly presented to them and to keep out of litigation questions which sound and fair administration would dictate should not be litigated. Because this evil is so clearly posed in the present case, this Court would, if it granted certiorari, have an unusual opportunity clearly and forcefully to point out the fault in the administrative process which is defeating all efforts to achieve simplicity and certainty in our tax laws. We believe that such action by this Court would have a most salutary effect and that it might greatly restrict the volume of tax litigation and alleviate the burden of taxpayers, of the Courts and of the Treasury Department as well.

Section 24 (c) of the Internal Revenue Code, as its legislative history shows and *as everyone with experience in the tax field knows*, was enacted for one purpose, and only for one purpose, namely, to prevent closely held corporations, reporting on the accrual basis, from taking deduction for an accrual in favor of a controlling stockholder reporting on the cash basis, where the person in favor of whom the accrual is made is not required to report the amount as income. The Section had no other purpose, as those charged with the administration of the law could not fail to recognize. The language of the Section is entirely appropriate to accomplish its purpose without involving hardship to anyone. The requirement of the section that a deduction be allowed as a deduction to the corporation on an accrual basis only if the accrued amount is "paid" within 75 days after the close of the taxable year is directed solely to preventing said amount from being allowed as a deduction to the corporation unless it promptly becomes a part of the taxable income of the stockholder. If the taxpayer is on the accrual basis so that he must report the accrual as income whether or not it is paid, the Section has no application.

It is obvious, therefore, that if an amount has been "received" by the payee in any manner, actually or constructively, which makes it a part of said payee's income, the entire purpose of the statute has been served. While in some connections "paid" may have other meanings, to hold that, under the section in question, an amount has not been "paid" when it has admittedly been "received" by the payee so that it must be reported in his income, is such an obvious distortion of the plain intent of the statute as to call not only for a reversal but also for a clear statement by this Court of the failure of the administrative process which burdens the public and the courts with litigation of such matters.

Even in the absence of any court decision, it is difficult to understand why the Commissioner should ever have attempted to read into a *loophole stopping statute like Section 24 (c)* a meaning which would extend its operation entirely beyond the evil at which it obviously was aimed and thereby work hardships upon persons who are in no way offending against the purpose of the statute. But after the pronouncement of the Circuit Court of Appeals for the Sixth Circuit in the case of *Musselman Hub-Brake Co. v. Commissioner*, 139 F. (2d) 65* clearly reviewing the legislative history and clearly setting forth the obviously correct interpretation of the section, the action of the Commissioner in continuing the effort to extend the section beyond its plain intent is beyond understanding.

It is earnestly to be hoped that this Court will grant writ of certiorari prayed for in the petition, not only in order to set at rest the very substantial amount of needless litigation with reference to this section, which is now pending and will continue until this Court has spoken, but also in order that the Court may take the opportunity which this case affords to inquire into the failure of the administrative processes, out of which arises the present attempt to misuse a fair and reasonably clear loophole

*The decision in the case at bar is clearly in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Musselman Hub-Brake Co.*, supra. The differences in the factual situations presented are entirely unimportant. The *Musselman* case recognizes the clear purpose of the statute and properly interprets the language so as to confine it to the purpose which it was intended to serve—the prevention of an unfair advantage against the Government when a controlled payor is on a different basis of accounting from the controlling payee. The case at bar completely ignores the purpose of the statute and twists it into an instrument of obvious injustice to the taxpayer. The *Musselman* case holds that when an amount is *constructively received* by the payee, so that it becomes a part of his taxable income, it is *"paid"* by the corporation within the meaning of Section 24 (c); the case at bar says that constructive receipt by the payee, who must then return the amount as his income, is insufficient.

stopping statute so as to work obvious hardships upon persons clearly without the scope of the statute's purpose and who are in no way required to be considered within its language.

The tax system of the Federal Government, already complex and overburdened with litigation, will become more and more cumbersome and the courts will be more and more filled with tax controversies unless there is developed in the officers charged with the administration of the law an attitude of fairness, which the litigation over this little remedial section would indicate is lacking. The present case is unusual in that its very simplicity makes the administrative failure so obvious. Congress cannot pass enough curative legislation or express its intention with sufficient clarity ever to clarify the tax situation if such extreme administrative constructions are permitted to stand; or if the administrative attitude out of which the construction arises is to receive the approval of the courts.

Respectfully submitted,

W. A. Sutherland,
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